Supreme Court, U.S.
FILED

No. 99 222 JUL 2 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WELTON PAGAN
Petitioner,

VS

THE STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WELTON PAGAN
10729 NW 31st Place
Gainesville, FL 32606
352-332-1974

29pp

QUESTIONS PRESENTED

1. Whether motions filed under F.R.C.P. 59 [e] toll the time for filing a Motion to Appeal if served within ten days of the granting of the motion by the trial court?

2. Whether the time for filing a Notice of Appeal is tolled when the trial court accepts the Motion as timely and the Department of Children and Families does not object to timeliness when they are filed?

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION.....2

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED 3

QUESTIONS PRESENTED 4

TABLE OF AUTHORITIES CITED 5

STATUTES AND RULES.....5

OTHER.....5

STATEMENT OF THE CASE 6-7

REASONS FOR GRANTING THE WRIT 8-10

CONCLUSION.....11

INDEX TO APPENDICES

APPENDIX A Trial Court Summary Judgement

APPENDIX B
Trial Court Order granting ten day extension

APPENDIX C Circuit Court of Appeals ruling

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

This petition is presented for review of the judgement of the Court of Appeals. No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28.U.S.C. 1254 [1].

The date on which the United States Court of Appeals decided my case was April 6, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case concerns Title VII of the Civil Rights Act of 1992 42.U.S.C. § 2000 e et Seq and the Equal Employment Opportunity Guarantee of the Fourteenth Amendment to the United States Constitution.
2. The Statutory provision of equal Employment under the 1968 Civil Rights Act and 1866 Civil Rights Act is also involved.
3. The State of Florida Statute 85-54.

QUESTIONS PRESENTED

1. Whether motions filed under F.R.C.P. 59 [e] toll the time for filing a Motion to Appeal if served within ten days of the granting of the motion by the trial court?

2. Whether the time for filing a Notice of Appeal is tolled when the trial court accepts the Motion as timely and the Department of Children and Families does not object to timeliness when they are filed?

TABLE OF AUTHORITIES CITED

CASES

1. 375 U.S. 384. Thompson v Immigration and Naturalization Service.
2. 371 U.S. 215,217,83 S.Ct283,285,91.Ed2d Harris Truck Line, Inc., v Cherry Meat Packers.Inc.
3. 375 U.S. 823,845.ct.62.11L.Ed56. Lieberman v Gulf Oil Corp.
4. 928 F.2d 1538[11th Cir 1991] Palm Beach Atl College v First United Fund Ltd.
5. 12 F.3d 1373 [5th Cir 1994] Richardson v Oldham
6. Keohane v Swarco, Inc., 6th Cir 1993- F. 2d[32L.W.2091]

STATUTES AND RULES

The post - trial motion was served and filed under Fed.R. Civ.P 59 [e].

OTHER

The internal; EEOC investigative report conducted by the department of Children and Families at Tacachalle, which was requested during the videotaped deposition, was never turned over to Counsel for the Plaintiff. This EEO report would have proved contradictions in testimony. Welton Pagan requested in writing from Tacachalle that any, every and all information in its entirety pertaining to position 55941 SRNS F/c Sequin Unit at Tacachalle be turned over.

There was no hearing on which to base the Summary Judgement in this case.

STATEMENT OF THE CASE

Welton Pagan, an African American male, a United States citizen, applied for the position of a senior registered nurse supervisor at Tacachalle, a Department of Children and Families facility. A white female applicant was hired with grossly less qualification than Welton Pagan.

Welton Pagan then filed a racial discrimination complaint with the State of Florida, Department of human Relations, after reviewing all the applications. Welton Pagan's Application was not processed, as required under Florida Statute 85-54, which was Posted at the Personnel Office at Tacachalle. There is no evidence on file, confirming that a complete background, law enforcement, personal reference check was ever done, as is required under Florida Statute 85-54, regarding the application of Welton Pagan. The Florida Department of Human Relations had the complaint from Welton Pagan for well over 180 days and did not do any investigation, despite repeated prompting. Therefore Welton Pagan obtained a Right to Sue, from the United States Justice Department and filed an Employment Discrimination lawsuit.

Following the completion of the Deposition and the filing of the motions, the Defendant Counsel for the Department of Children and Families filed for Summary judgement. Included in the motion was the claim that Welton Pagan was not hired because he had no experience in working with developmentally, mentally retarded clients. However, this was not a requirement, nor was it included in the job description, when posted. The Honorable Court rendered the Summary Judgement for the Defendant on June 12,1998.

STATEMENT OF THE CASE (CONT'D)

Counsel for the Plaintiff was on vacation from June 10 - 22, 1998. During this time period the Plaintiff Counsel's office received a copy of the Order from the United States District Court, Northern District of Florida, Gainesville granting the Summary Judgement, Plaintiff Counsel was not available to read the response or to file a Motion for Reconsideration.

On June 23, 1998, Plaintiff requested the Honorable Court to grant a ten day extension in order to prepare a Motion for Reconsideration. The Motion of Reconsideration was requested because Welton Pagan discovered that fraud had been committed after the Summary Judgement was rendered. Apparent physical tampering and substitution of codes and revision dates entered on the State of Florida application form was evident. The content of the application form of the white applicant was changed from the original reviewed. Counsel for the Plaintiff attempted to contact the Counsel for the Defendant and was unable to contact Leslie Street Esq. The Honorable Court granted the Motion for Extension of time on June 30, 1998, and ordered that the motion be filed on or before July 6, 1998. Welton Pagan prepared a signed affidavit and attached the apparently altered documents to the Motion for Reconsideration which was filed on July6, 1998. The Honorable Court denied the Motion for Reconsideration on July21, 1998 without comment. Counsel for the Plaintiff then filed an Appeal to the United States 11th Circuit Court of Appeals in Atlanta, Georgia on August 19, 1998. The 11th Circuit Court of Appeals then denied the appeal on April 6, 1999 as being untimely citing Fed. R. Civ.P.59 [e].

REASONS FOR GRANTING THE PETITION

1. There is overwhelming evidence that under F.R.C.P. 59 [e] tolls the time for filing a Notice of Appeal from legal precedent set by the Supreme Court of the United States itself.

A. 375 U.S. 384 Thompson v Immigration and Naturalization Service No 496 Jan4, 1964. The United States Supreme Court granted a Writ of Certiorari ,the judgement vacated and the cause remanded. The time fore filing a notice of appeal from a judgement under F.R.C.P. 59 [e] was tolled until all Rule 57 motions were denied. There was a ten-day extension in this case. Sixty days of the original entry of judgment, by the Circuit Court, the petitioner filed the appeal.

B. Harris Truck Lines, Inc., v Cherry Meat Packers Inc. 371 U.S. 215,217,83 S.Ct. 283,285 9L.Ed 2d 261. The petitioner received from the trial court a thirty-day extension in the time for filing a motion to appeal on the ground of excusable neglect based on a failure to learn of the entry of judgement. Federal Rule of Civil Procedure 73 [a]. The petitioner then filed his appeal within the period of the extension, but beyond the original period. The Circuit Court of Appeals concluded that there had been no excusable neglect within the meaning of Rule 73 [a] held that the District Court erred in granting the extension and dismissed the appeal. The Supreme Court reversed the dismissal and remanded the case to the Court of Appeals. In Welton Pagan v The Department of Children and Families the trial Court granted the Plaintiff Counsel a ten-day extension because Summary Judgement was rendered while Plaintiff counsel was on vacation. Therefore the time for filing the Notice of Appeal should be tolled just as in the Harris Case.

REASONS FOR GRANTING THE PETITION (CONT'D)

C. Lieberman v Gulf Oil Corporation. 2 Cir.,315 F.2d. 403,275 U.S. 823,84 S.Ct. 11L. Ed 2d.56. Here as in the Harris case, the petitioner did an act, which if properly done, postponed the deadline for filing the motion of his appeal. The District Court concluded that the act had been properly done. The petitioner relied on the statement of the District Court and filed an appeal within the assumedly new deadline, but beyond the old deadline The Court of Appeals concluded that the District Court had erred and dismissed the appeal. Here again the Supreme Court granted the Writ of Certiorari, vacated the judgement and remanded the case back to the Court of Appeals.

D. A motion for Reconsideration tolls the time for appeal by any party and thus a notice of appeal, filed by a party within the time permitted, after denial of the motion for reconsideration, is timely. Palm Beach Atl College v First United Fund. 4d. 928. F. 2d1538 [11th Cir 1991].

E. The time for filing a notice of Appeal from a judgement is tolled until all Rule 59 motions are denied. Richardson v Oldham. 12 F.3d. 1373[5th Cir. 1994].

2. The time for filing a notice of appeal in this case is tolled because the Trial Court granted the motion for reconsideration. Counsel for the Defendant, Department of Children and Families did not object to the timeliness of the motion. Secondly the Defendant for the Department of Children and Families did not object to the timeliness of the appeal filed in Atlanta, Georgia.

Pursuant to Federal Rule APP.P. 4 [a] [4] the time for appeal runs from the entry of an order disposing of an outstanding motion filed under Rule 59. Federal Rule 4 [a] [4] [c]. In the instant case the notice of the

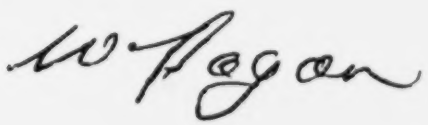
appeal was timely filed within thirty days of denial of Plaintiff Rule 59 [e] motion for reconsideration as required by Federal Rule APP.P.4[a] [I].

Secondly in the Keohane v Swarco Inc., 6th Cir 1963, the court of appeals held that the time a post trial motion was served, rather than the time it was filed, tolled the time for filing a notice of appeal. The beginning of the time period should be from the time of receipt of the notice of judgement. The ten-day period would be defined uniformly and no other interpretation of the rules would be required.

CONCLUSION

Petitioner asks the court to grant review because of the important questions raised on the Application of the rules of civil procedure and the application of these rules to Equal Employment proceedings.
The petition for a Writ of Certiorari should be granted.

Respectfully submitted



July 1,1999

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

WELTON PAGAN,

Plaintiff,

v. CASE NO. 1: 96-CV-207-MMP

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Defendant.

_____/

ORDER

This cause comes before the Court upon Defendant's motion for summary judgment (doc. 50) to which Plaintiff has filed his response (doc. 56), and to which response Plaintiff has replied (doc. 61). For the reasons discussed more fully below, the Court is of the opinion that Defendant's motion should be and the same shall be granted.

BACKGROUND:

Plaintiff Welton Pagan, an African-American male, is and has been employed by Defendant at all times relative to the present action. Born in Jamaica, Plaintiff subsequently resided in the United Kingdom where he obtained a Bachelor of Arts degree, and he has since obtained citizenship

ENTERED ON DOCKET 6/14/98 BY BMS
[Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP]
Copies mailed to: Pagan, Scott + Street Bell

OFFICE OF CLERK
U.S. DISTRICT CT.
NORTH DIST. FLA.
GAINESVILLE, FLA.
98 JUN 12 PM 4:29
FILED

in the United States. He is a registered psychiatric nurse, possesses certification from the American Nursing Association ("ANA") in psychiatric and mental health nursing, and is a registered general nurse. Additionally, Plaintiff claims the following credentials:

> Plaintiff has 10 graduate level credits from the University of Arkansas and 25 years experience in psychiatric mental health nursing, child adolescence, forensics, acute and long stay, and psychiatric case management. Plaintiff worked in formal management and supervisory roles as Director of Nursing and Assistant Head Nurse and Team Leader. Plaintiff has developed and presented community workshops at hospitals as well as developed and presented feasibility studies. Plaintiff has trained in crisis intervention and has complete a formal course in his B.S.N. Program to meet the specific criteria for the S.R.N.S. position of professional strategies, health restoration area I and II, and health support area I and II.

Plaintiff's Response in Opposition to Summary Judgment (doc. 56, at p.4).

On or about October 5, 1995, Plaintiff applied for the position of Registered Nurse Specialist F/C at Defendant's Tacachale facility in Gainesville, Florida. Plaintiff was denied the position and was provided information that the reason for his denial was that Marcia Dougherty, a white female, was better qualified for the position. Claiming that Dougherty was less qualified than he, Plaintiff pursued and exhausted all administrative remedies and has now filed the instant action claiming that Defendant unlawfully discriminated against him based upon his race and/or sex, and/or his national origin.

The following facts have been taken from Defendant's statement of uncontested material facts: Defendant originally advertised for applications for a nursing supervisor position at the Seguin Unit in Tacachale in the Fall of 1995. This institution is designed for housing developmentally

disabled adults. Specifically, the Seguin unit houses those mentally retarded men who have been charged with felonies, but who were found incompetent to stand trial. The advertisement stated the minimum qualifications as a registered professional nurse with three years of experience as a professional nurse. The advertisement noted that some of the required years of nursing experience could be substituted with a bachelor's or master's degree. The minimum knowledge, skills, and abilities were also included in the advertisement.

The individual responsible for filling this position was Willard A. Long, who was the residential services director at Seguin. Long developed a set of knowledge, skills, and abilities ("KSA's") for the position according to Department procedure, and in order to screen the applications to select interviewees. Long developed KSA's which he thought were necessary for the position based on his experience as residential services director. The two most important KSA's identified by Long involved nursing experience with developmentally disabled adults. He sought skill in evaluating acute and chronic nursing needs for these types of patients and for skill in implementing the nurses role "within the interdisciplinary team in a forensic facility for the developmentally disabled." Long also looked for significant supervisory experience, and would not consider any applicant without some degree of experience working with developmentally disabled adults or without extensive supervisory experience beyond supervisory experience as a mental health nurse. According to Long, psychiatric nursing experience did not fall within the KSA's identified for this position.

Plaintiff's application consisted of the standard State of Florida employment application form, two performance evaluations, and a cover letter. His application was one of seven selected as having satisfied the

minimum qualifications. Following the Department's operating manual procedure, Long evaluated each of the seven finalists by assigning a score of zero to three for each of the previously established KSA criteria. The four applicants with the highest composite KSA score, were selected for interviews. The interviewees were as follows: Cynthia Barr, an African-American female and Marsha Dougherty, a Caucasian female, who both tied for the highest composite KSA score; Jerry Davis, an African-American male; and Sharon Mayes, a female of unidentified race. The three finalists not chosen for an interview were Plaintiff (who's KSA composite score was the lowest of the seven finalists); one African-American female; and one Caucasian female. Davis was ultimately never interviewed because the Department was never able to contact him, and Marsha Dougherty was selected for the position.

After being notified of the Department's decision, Plaintiff timely filed his administrative claims alleging, as he has here, that he was better qualified than Dougherty based on his having more training and experience. According to Defendant, the higher levels of training and experience identified by Plaintiff in this action were never made part of his original application materials, and were nonetheless unrelated to experience with a developmentally disabled population as preferred by the KSA's.

STANDARD OF REVIEW:

In evaluating Defendant's motion for summary judgment, this Court must examine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). All of the evidence and reasonable factual inferences drawn from the evidence must be construed in a light most favorable to the party opposed to a motion for

summary judgment. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 332, 110 S. Ct. 1884, 1888 (1990)(citing Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

Additionally, courts require a heightened standard when reviewing summary judgment motions in employment discrimination cases. See, e.g., Batey v. Stone, 24 F.3d 1330 (11th Cir. 1994). Summary judgment should be used cautiously in employment discrimination cases since ruling on such a motion requires the court to examine motive and intent. See id. at 1336.

Even should Plaintiff establish a prima facie case of employment discrimination, once the Defendant offers evidence of a legitimate non-discriminatory reason for the employment action, in order to defeat summary judgment, Plaintiff must present "concrete evidence in the form of specific facts" demonstrating that the Defendants' reason is only a mere pretext to discrimination. Davis v. AT&T, 846 F. Supp. 967, 969 (M.D. Fla. 1993). Plaintiff cannot simply "rely on the possibility that the jury might infer a discriminatory motive." Id. The Eleventh Circuit Court of Appeals has held that "[i]n an employment discrimination case, the plaintiff *must produce sufficient evidence* to support an inference that the defendant-employer based its employment decision on an illegal criterion." Benson v. Tocco Inc., 113 F.3d 1203, 1207 (11th Cir. 1997)(emphasis supplied)(citations omitted). The relevant inquiry regarding summary judgment is whether a reasonable person could infer discrimination *based on the facts presented,* assuming those facts were to remain unrebutted. See id. As a result, an employment discrimination plaintiff is entitled to prevail on summary judgment only when the evidence is sufficient to show that there is a genuine issue of fact regarding the truth of every reason prof-

fered by the employer for its alleged discriminatory actions. See id. (citing Combs v. Plantation Patterns, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied.* _U.S._, 118 S. Ct. 685, 139 L.Ed.2d 632 (1998)). The plaintiff need only establish a prima facie case and present evidence sufficient "to allow a fact finder to disbelieve an employer's proffered explanation." Combs, 106 F.3d at 1532.

DISCUSSION:

The Local Rules of this district require that with respect to motions for summary judgment, the moving party shall file "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Rule 56.1 (A). Furthermore, the party opposed to summary judgment, must under the same rule "file and serve a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, in the format set forth above [i.e. with references to appropriate sources of the facts by page and/or paragraph number]." Id. Local Rule 56(A) goes on to provide that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be filed and served by the opposing party." Id.

Defendant has complied with the Local Rule by incorporating a separate statement of undisputed material facts within its motion for summary judgment. See (doc. 50, at pp. 8-13). The only factual dispute addressed by Plaintiff in his response to the motion for summary judgment is found on page five of his response where Plaintiff refers to excerpts from his own deposition wherein he claims to have attempted to supplement his application materials. According to Plaintiff, this creates "an obvious factual dispute [] regarding plaintiff's attempts to provide a complete and thor-

ough application for the position sought." (doc. 56, at p.5).

Additionally, Plaintiff did provide the following general statement in his "preface" to his forecast of the evidence:

> The deposition testimony of the plaintiff and of Willard Allen Long, together with the documentary evidence in the discovery papers which are excerpted in plaintiff's motion for summary judgment, specifically the employment of the applications for the position applied for in denying the plaintiff, illustrate facts underlying the plaintiff's discrimination claims. This evidence controverts critical elements of the defendant's statement of facts and adds significant factual details which bear on the ultimate issue of discrimination.

(doc. 56, at p.3). This generalized statement of the existence of a dispute as to material facts, despite being logically incoherent, falls well short of the requirements of Local Rule 56(A) that the party opposing summary judgment provide a separate statement of the material facts as to which it is contended that there exists a genuine issue to be tried. To the extent that it might be read to comport with this portion of the Local Rule, it certainly is not presented in the format required by the Local Rule. The Rule provides that each party's statement:

> shall reference the appropriate deposition, affidavit, interrogatory, admission, or other source of the relied upon material fact, by page, paragraph, number, or other detail sufficient to permit the court to readily locate and check the source.

Furthermore, as noted above, with respect to the party opposing summary judgment, the Rule explicitly states:

> All material facts set forth in the statement required to be served by the moving party ***will be deemed to be admitted*** unless controverted by the statement required to be filed and served by the opposing party *[which statement shall be submitted in the format set forth above].*

Local Rule 56 (A) (emphasis supplied).

For the foregoing reasons alone, this Court believes that summary judgment in favor of Defendant would be justified. Procedurally, Plaintiff has failed to properly establish that there is a genuine dispute as to any material issue of fact with respect to his claims. However, in an effort to completely resolve the issues in the defendant's motion, the Court will address the motion in its entirety.

PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION:

In order to establish a prima facie case of discrimination based upon circumstantial evidence, as alleged by Plaintiff, he must establish the following four factors, as modfied to accommodate the circumstances involved herein: (1) that he is a member of a protected class; (2) that he applied for and was qualified for the job for which he applied; (3) that he was not selected for the job (or selected for an interview); and most importantly (4) that a person outside of his protected class with equal or lesser qualifications was selected for the job (or persons outside of his protected class were selected for interviews). See Shealy v. City of Albany, Ga., 89 F.3d 804, 805 (l 1th Cir. 1996)(citing McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 669 (1973)).

Defendant concedes the first three elements of the prima facie case. With respect to the fourth, Defendant argues that Plaintiff has failed to establish this crucial factor for two reasons. First, he cannot show that those selected for the job and for interviews, were equally or less qualified; Defendant claims each of the other six were *more* qualified than Plaintiff. And second, Defendant argues that Plaintiff cannot show that the selection of one African-American female and another African-American male was a pretextual act to disguise intentional discrimination against Plaintiff

on the basis of either his race or sex.

Based on the undisputed record evidence regarding the qualifications of each of the six other finalist applicants, the Court agrees with Defendant that Plaintiff is unable to establish that he was as equally qualified as the other six candidates. Marsha Dougherty who scored the highest at 17 points, was a licensed registered nurse with seven years experience and had worked at the Seguin unit for six years, assuming supervisory roles, providing resident assessments, conducting staff training, developing curricula and monitoring programs, as well as assisting in behavioral control. Cynthia Barr, an African-American female, tied for the highest score and had eleven years of registered nursing experience, six with developmentally disabled residents. She had supervised other nurses, evaluated staff, and formulated nursing standards and operating procedures. Jerry Davis, an African-American male, had worked at Tacachale for almost one year, had extensive supervisory experience in a forensic facility, had been a nursing supervisor and team leader, and had some experience with the developmentally disabled. Sharon Mayes had been a registered nurse for seven years and worked at Tacachale with elderly developmentally disabled residents; she had been a director of nursing for two years and the assistant thereto for three. Plaintiff's application showed no experience with the developmentally disabled, and his application reflected only one and a half years of supervisory experience as a LPN supervisor. His training reflected only psychiatric and mental health nursing.

Plaintiff has argued that he was denied the opportunity to supplement his application, yet Defendant's unrebutted record evidence establishes that even had his application been supplemented as he claims it should have been, his KSA composite score would only have increased by three

points, which would still make his score the lowest of all seven finalists. Plaintiff has failed to produce any evidence, other than his own subjective belief that he had been discriminated against, to establish that he was as equally or more qualified than the six individuals who placed higher than he. Accordingly he has failed, as a matter of law to establish a prima facie case of discrimination sufficient to withstand the pending motion for summary judgment.

Even if this Court were to have concluded that Plaintiff could establish a prima facie case of discrimination, the McDonnell Douglas analysis requires the Court to consider whether Defendant has established a legitimate, non-discriminatory basis for the adverse action taken against Plaintiff. Here, the unrebutted record evidence is clear that Long selected the interviewees, including two members of Plaintiff's protected class, based strictly on a numerical calculation derived from scoring of the established KSA's identified as necessary for the position. Plaintiff's lack of experience with developmentally disabled adults, and the limited nature of his disclosed supervisory experience, resulted in the lowest numerical score. This Court concludes that the Defendant's use of the KSA composite scoring system to screen applicants based on their qualifications and experiences for a specific position is a legitimate, non-discriminatory basis for the adverse result suffered by Plaintiff. See, e.g., Senner v. North Central Tech. College, 113 F.3d 750, 755-56 (7th Cir. 1997).

Having established a legitimate, non-discriminatory basis for the adverse action taken against Plaintiff, the burden shifts back to plaintiff to establish that the proffered reason was merely a pretext for the Defendant's discriminatory intent. See Combs, 106 F.3d at 1528. As mentioned, *supra*, Plaintiff must present "concrete evidence in the form of specific facts" demonstrating that the Defendants' reason is only a mere pre-

text to discrimination. Davis v. AT&T, 846 F. Supp. 967, 969 (M.D. Fla. 1993). Plaintiff cannot simply "rely on the possibility that the jury might infer a discriminatory motive." Id. The Eleventh Circuit Court of Appeals has held that "[i]n an employment discrimination case, the plaintiff *must produce sufficient evidence* to support an inference that the defendant-employer based its employment decision on an illegal criterion." Benson v. Tocco Inc., 113 F.3d 1203, 1207 (11th Cir. 1997)(emphasis supplied)(citations omitted). The relevant inquiry regarding summary judgment is whether a reasonable person could *infer* discrimination based on the facts presented, assuming those facts were to remain unrebutted. See id. Plaintiff's subjective belief that he was discriminated against standing alone is insufficient to support an inference that a proffered non-discriminatory reason is merely pre-textual for an unlawful discriminatory intent. See Holifield v. Reno, 115 F.3d 1555, 1564-66 (11th Cir. 1997). In this case, plaintiff has failed to produce any evidence sufficient to allow a reasonable fact finder to disbelieve Defendant's proffered legitimate, non-discriminatory reason for selected others than Plaintiff for the position and interviews, or to infer pretextual discrimination.

Based upon the fact that this Court has concluded that plaintiff has procedurally deemed admitted those facts alleged by Defendant in its statement of undisputed facts, and based upon the fact that this Court has concluded that Plaintiff has failed to establish either a prima facie case of discrimination under the McDonnell Douglas framework or that Defendant's proffered legitimate, non-discriminatory reason for taking adverse employment action against Plaintiff was pretextual, Defendant is entitled to judgment in its favor as a matter of established law.

Accordingly, it is now hereby

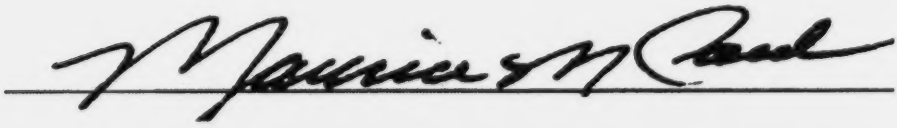
ORDERED AND ADJUDGED:

1. Defendant's motion for summary judgment (doc. 50) is GRANTED.

2. The clerk is directed to enter final judgment in favor of Defendant and against Plaintiff, and to close this case.

3. The pre-trial conference currently set for July 2, l 998 is hereby CANCELED.

DONE AND ORDERED in Chambers this 12th day of June, 1998.



MAURICE M. PAUL, SENIOR DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

WELTON PAGAN

VS CASE NO. 1:96CV207 MMP

DEPT. CHILDREN SERVICES

REFERRAL AND ORDER

Referred to Judge Maurice Paul on June 26, 1998,
Motion/Pleadings: Motion for extension of time in which to file a motion for reconsideration of order granting summary judgement (10 days)
Filed by pla. Pagan on 6/24/98 Doc.# 64

RESPONSES:

_____ on _____ Doc.# _____

_____ on _____ Doc.# _____

ROBERT A. MOSSING, CLERK

1_____ BY:_____

LC (1 OR 2) Deputy Clerk: Kathryn Revell

ORDER OF COURT

It is ORDERED this 30th day of June, 1998, the requested relief is granted - to be filed on or before July 6, 1998.

Maurice M. Paul

MAURICE M. PAUL
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET 6/30/98 BY KR
Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP

Copies mailed to: Pagan, Scott, Street

66

OFFICIAL FILE COPY
U.S. DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
98 JUN 30 PM 2:04
FILED

1:96-cv-00207

knr

WELTON PAGAN
10729 NW 31ST PL
GAINESVILLE, FL 32602

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 98-3181

WELTON PAGAN,

Plaintiff-Appellant,

versus

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,
FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Florida

Before **BIRCE, CARNES and BARKETT, Circuit Judges.**

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. To be timely, a notice of appeal in a civil case must be filed no later than 30 days after final judgment is entered on the district court docket. See Fed.R.App.P. 4(a)(1). The requirement of a timely notice of appeal is "mandatory and jurisdictional." See Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556, 561, 54 L.Ed.2d 521 (1978); Campbell v. Wainwright, 726 F.2d 702, 703 (11th Cir. 1984) A motion for reconsideration, construed as a Fed.R.Civ.P. 59(e) motion to alter or amend the judgment. may toll the appeal period if the motion is filed within 10 business days of entry of judgment. See Fed. R.App.P. 4(a)(4)(C), Stallworth v. Shuler, 758 F.2d

1409,1410(11th Cir. 1985)

In this case, the tenth business day after the June 16 1998, entry of judgment fell upon Tuesday, June 30, 1998. Appellant's motion for reconsideration was untimely filed on July 6, 1998, and did not toll the appeal period, notwithstanding that the district court granted Appellant an extension of time to file his motion for reconsideration. Federal Rule of Civil Procedure 6(b) expressly forbids the district court from enlarging the period for filing Rule 59(e) motions. The district court's June 30, 1998, order purporting to grant Appellant a 10-day extension of time was therefore void ab initio. See Pinion v. Dow Chemical, U.S.A., 928 F.2d 1522, 1525-26 (11th Cir.), cert. denied, 509 U.S. 968 (1991). Because Appellant's motion for reconsideration did not toll the time to appeal, his notice of appeal should have been filed no later than Thursday, July 16, 1998, the thirtieth day following entry of judgment. Appellant's August 19, 1998, notice of appeal was untimely by more than one month. We thus lack jurisdiction over this case.